

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
PETITION FOR
REHEARING
EN BANC**

ORIGINAL

74-2328

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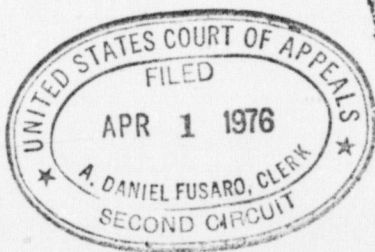
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,	:	
	:	
Appellee,	:	
	:	
-against-	:	Docket Nos.
	:	74-2328 et
	:	al.
HARRY BERNSTEIN, * * * MELVIN	:	
CARDONA * * *, et al.,	:	
	:	
Appellants.	:	

x

PETITION FOR REHEARING
ON BEHALF OF APPELLANT
MELVIN CARDONA

(WITH APPENDIX)



JOHN A. KISER,

Attorney for Melvin Cardona,
Defendant-Appellant
Office and P. O. Address
36 West 44th Street
New York, N.Y. 10036
(Tel. No.: 212-682-2920)

PETITION FOR REHEARING

Introductory

Appellant Cardona respectfully petitions this Court for rehearing upon the ground that the Court has overlooked, or misapprehended, facts which go to the very heart of this appellant's contention that he was deprived of a fair trial.

Appellant Cardona also joins in the points made in the separate petitions for rehearing on behalf of the appellant Behar and the appellants Bernstein, et al.

These misapprehensions as to the facts appear to have had a very substantial impact on the Court in its rejection of our contention that appellant Cardona did not receive a fair trial.

The majority opinion states that "there was overwhelming evidence of Cardona's participation in the false statement fraud ***" (6661).

Further, that "the proof of Cardona's guilt was overwhelming" (6674).

Also, that "The testimony of Kapraki and accountant Abad was corroborated here by documentary evidence, moreover, including specifically checks representing some of Kapraki's payments to Cardona for the false financial statements concerning self-employment" (6656).

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The principal thrust of this petition is that this "overwhelming" documentary evidence to which the majority alludes, is of no independent probative value apart from the testimony of the co-conspirator witnesses, and is, in fact, inconsistent with that testimony.

We apologize to this Court for the omission to analyze this documentary evidence in Cardona's main brief, and most urgently request the Court to now give it careful consideration, lest appellant Cardona be prejudiced by this omission by counsel.

In like manner, appellee's counsel also omitted to review this evidence and, without citing a single exhibit, contented themselves with the supremely confident, but totally erroneous, assertion:

"*** the testimony of Kapraki and Abad was corroborated by various documentary evidence, including the checks representing some of Kapraki's payments to Cardona for the false financial statements concerning self-employment, ***" (Brief for Appellee, p. 100).

The only oral testimony implicating the appellant Cardona was given by Kapraki and Abad. This testimony, being that of co-conspirators, is suspect as a matter of law.

Further, as set forth in the brief on behalf of appellant Cardona (pp. 10-14), Kapraki was a cheat and a fraud of

extraordinary distinction, and Abad was a recent immigrant from Ecuador, who had special reasons to fear the prosecutor's wrath. Further, the falsehood of Abad's testimony was shown by cancelled checks bearing his endorsement (Tr. 7692, et seq. ; * Main Brief, pp. 13-14).

Since the testimony of Kapraki and Abad was "tainted", we must assume that the evidence which so overwhelmed the Court was the "documentary evidence, * * *, including specifically checks representing some of Kapraki's payments to Cardona for false financial statements concerning self-employment" (6656).

These checks (Exhs. 161; 161 A-G) which appellee's counsel said "represented" some of Kapraki's payments to Cardona for the false financial statements" (Brief, p. 100) are eight in number and were marked for identification at Tr. 4542-3 and received in evidence at Tr. 4556).

For the convenience of the Court, photostats of these exhibits are supplied in the Appendix annexed to this petition (A 1-8). (We are appreciative of the assistance of Appellee's counsel in disinterring the original exhibits from their basement.)

*References preceded by Tr. are to the Transcript in the District Court.

Kapraki testified that, unlike the other employees of Eastern Service Corporation upon whom she lavished her largesse, she never made any cash gifts to Cardona or gave him a single penny for himself (Tr. 6291).

Kapraki's testimony was that all of her payments to Cardona for accounting assistance were either (a) \$95. where only balance sheets and profit and loss statements were needed, or (b) \$145. where tax returns were required as well.

The appellee's contentions as to the financial transactions between Kapraki and Cardona are set forth in its brief as footnotes to pages 33 and 41, as follows:

"Kapraki paid Cardona \$95 for a set of financial statements consisting of a profit and loss statement and a balance sheet (R. 3740, 3745-3746). She paid \$145 for a set consisting of a balance sheet and income tax returns (R. 4421). Cardona pocketed some of this money himself, and gave the rest to the accountant (R. 5457). Kapraki usually paid the money to Cardona in cash, but sometimes by check. Kapraki's testimony in this regard was corroborated by the introduction in evidence of these checks." (Fn. to p. 33; Emphasis is supplied.)

"As noted earlier, Kapraki paid Cardona \$95 or \$145 per set, depending on whether income tax statements were included." (Fn. to p. 41)

These checks not only do not "corroborate" the accomplice testimony of the witness Kapraki, but show conclusively that here, as throughout her testimony, she was plainly lying.

POINT I.

THE DOCUMENTARY EVIDENCE DID
NOT CORROBORATE THE TESTIMONY OF
THE WITNESS KAPRAKI, BUT DEMON-
STRATES ITS FALSITY.

(1) As a Matter of Law:

It is well settled that corroborative evidence "is evidence which is independent of the evidence of an accomplice, and which, taken by itself, leads to the inference, not only that a crime has been committed, but that the person on trial was implicated in it; or it must be evidence which corroborates as to some material fact or facts which go to prove that the person on trial was connected with the crime." (U. S. v. Murphy, 253 Fed. 404, 406 (D.C.N.Y. 1918)).

Or, as stated in Ing v. U.S., 278 F. 2d 362, 367 (9 Cir. 1960):

"* * * the rule appears to be well established that the corroborative evidence must be considered without the aid of the testimony to be corroborated, and that such corroborating evidence must connect or tend to connect the accused with the commission of the crime with which he is charged. 22 C.J.S. Criminal Law § 812, p. 1394. Such testimony is not sufficient if it requires the interpretation and direction of the testimony to be corroborated."

In the instant case, the evidence plainly required the "interpretation and direction of the testimony to be corroborated" (Ing v. U.S., ante.)

Absent such "interpretation and direction", the documents in no way connect the appellant Cardona with the commission of the crimes with which he is charged.

(2) As a Matter of Simple Arithmetic:

The Court will recall:

"As noted earlier, Kapraki paid Cardona \$95 or \$145 per set, depending on whether income tax statements were included." (Appellee's Brief; p. 41).

(a) Exhibit 161 B (3-A) is a check to Cardona by Kapracki's realty company in the amount of \$425.

\$425. is not divisible by either \$145. or \$95., or by any combination of the two.

Kapraki is not "corroborated"; but she is plainly lying.

(b) Exhibit 161 C (4-A) is a check to Cash by Kapraki's realty company in the amount of \$375.

Here again, \$375. is not divisible by either \$145. or \$95., or by any combination of the two.

Here again, Kapraki is plainly lying.

(c) Exhibit 161 D (5-A) is a check to Cardona by Kapraki's realty company in the amount of \$625.

Here again, \$625. is not divisible by either \$145. or \$95., or by any combination of the two.

Here again, Kapraki is plainly lying.

Exhibit 161-D, however, contains the notation on

its face "P & L". This, Kapraki contended, proved that it represented payments for accounting work. However, she further testified that this embellishment had been placed on the check, by her, some time after it had cleared her bank and was returned to her! (Tr. 4564-5).

Thus it is clear that not only was Kapraki lying in her oral testimony, but her documentary evidence was fabricated as well.

(d) Exhibit 161 G is a check to Cash by Kapraki's realty company, in the amount of \$555.

Here again, \$555. is not divisible by either \$145. or \$95., or by any combination of the two.

Here again, Kapraki is plainly lying.

(e) Exhibits 161 and 161 F are checks to Cardona, both in the amount of \$870.

Exhibit 161 F (7-A) shows on its front and back that it was never negotiated by anyone.

Exhibit 161 (1-A), however, was cashed by Cardona. Kapraki testified that this check represented payments for six sets of financial statements and tax returns at \$145. per set (Tr. 4549). In this case, unlike the four checks discussed above, the arithmetic, as also in the cases of Exhs. 161 A and 161 E, proves out.

However, there are notations on the back of the check (1-A) which squarely contradict Kapraki's testimonial claim of "six times \$145". Those notations

show that the \$870. payment was made up of three elements, as follows:

$$\begin{array}{r} \$800. \\ 50. \\ 20. \\ \hline 870 \end{array}$$

Here again, Kapraki is plainly lying.

(3) Further Documentary Demonstration of Kapraki's Dishonesty.

The contentions in this Court by appellee's counsel as to "corroboration" are most surprising, not only in view of the foregoing, but also in view of information made available to such counsel immediately after trial.

At trial, Cardona contended that the "161 Exhibits" were checks representing repayment of loans by him to Kapraki; as the notations on the back of Exhibit 161 suggest (1-A).

On cross-examination, Kapraki first flatly denied that Cardona had made any loans to her (Tr. 6340). Later, when confronted by a check for \$500., she admitted a loan in that amount, but denied any others. (Tr. 6344-5). She was adamant in this regard:

"Q Isn't it a fact that the checks 161 and 161-A through G in Evidence were repayments of loans totalling approximately \$3,000 made by Mr. Cardona to you?

A No, that is not a fact." (Tr. 6349).

After verdict, but prior to sentence, Appellant Cardona moved for a new trial upon the ground of newly discovered evidence (Record Doc. # 172). This motion was

denied on September 27, 1974.

Cardona's moving affidavit showed that during the course of the trial he recalled asking Kapraki to sign a memorandum on the reverse side of a bank deposit slip to show the balance due him on loans which he had made to her.

However, he was unable to locate the bank deposit slip until after the verdict, when he found it in a file containing his bank records for a different year.

Appellant Cardona then moved for a new trial (Record Doc. 172).

A photocopy of the deposit slip (9-A) was annexed to his motion papers. This reads as follows:
"\$4,500. — Note July 15, 1968 Reduced to \$2,575 — shall be paid by February 25, 1969. [Sgd.] Kapraki".

Appellee's counsel opposed the motion in the District Court upon the grounds (a.) that Cardona should have discovered the evidence sooner, and (b.) that Kapraki had not denied any and all loans from Cardona. They did not, however, question the authenticity of the document.

Thus it is especially surprising that appellee's counsel, in this Court, continue to contend that the eight cancelled checks "corroborate" Kapraki's testimony when, in view of the foregoing, they, and the deposit slip memo (9-A), so clearly demonstrate that her testimony implicating Cardona was a fabrication.

POINT II.

A REHEARING SHOULD BE GRANTED
AND UPON SUCH REHEARING, APPELLANT
CARDONA SHOULD BE GRANTED A NEW TRIAL.

If the Court, upon its review of the evidence, concludes, as we believe it must, that Appellant Cardona's conviction was predicated solely upon the uncorroborated, and less than overwhelming, testimony of accomplices, who have been shown to be liars and perjurers, then a rehearing should be granted. Upon such rehearing, Cardona should be given a new trial upon all of the "fair trial" considerations set forth in the brief heretofore on behalf of appellant Cardona.

Respectfully Submitted,

New York, N. Y.,
April 1, 1976

JOHN A. KISER,
Attorney for Appellant
Melvin Cardona

APPENDIX
To
Petition for Rehearing

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Exhibit to Motion for a New Trial	9-A

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Exh. 161 A

THIS CHECK IS IN PAYMENT OF THE FOLLOWING ACCOUNT
 PAYEE'S SIGNATURE BY PAYEE CONSTITUTES RECEIPT IN FULL

IF INCORRECT PLEASE RETURN

DATE	PARTICULARS	AMOUNT

48TH ST. REALTY CO., INC.
 4805 5TH AVENUE BROOKLYN, N. Y. 11220

No. 1167

11/5

1968

1-2
210

Pay to the order of

Cash

\$ 375.00

Three Hundred Seventy Five and 00/100 Dollars

THE CHASE MANHATTAN BANK
 National Association
 Second Avenue at 41st Street Brooklyn, N. Y.

PAID
 C.M.E.N.A.

NOV 8 1968

Robert A. King

⑆0210⑉0002⑆ 048⑉1⑉020261⑉

⑈0000037500⑈

*Rebecca Cardone
 2954 Valentine Ave. Bklyn*

NOV 8 1968
 02 112 82 153

Exh. 161 C

THIS CHECK IS IN PAYMENT OF THE FOLLOWING ACCOUNT
ENDORSEMENT BY PAYEE CONSTITUTES RECEIPT IN FULL

IF INCORRECT PLEASE RETURN

DATE	PARTICULARS	AMOUNT

48TH ST. REALTY CO., INC.
4805 5TH AVENUE BROOKLYN, N. Y. 11220

No. 1500

CMB.NA

Pay to the order of

CASH

12/24 1968

1-2
210

DEC 30 1968

One Hundred forty Five and 1/10 Dollars

THE CHASE MANHATTAN BANK

National Association

Second Avenue at 41st Street, Brooklyn, N.Y.

CMB.NA

PAID

DEC 30 1968

Arthur D. Kopych

⑆02⑆0⑆0002⑆048⑆1⑆020261⑆

⑆0000014500⑆

John Carlon
1500
30
67550-015369
275-4Valentin
275-4Valentin
275-4Valentin

DEC 30 1968
1-2
1500
THE CHASE MANHATTAN BANK
NEW YORK, N.Y.

DEPOSITOR'S COPY

19 68

FOR CREDIT TO THE ACCOUNT OF

Exchange check - 250

DEPOSITED WITH

M MANUFACTURERS HANOVER TRUST COMPANY NEW YORK

(Subject to the provisions of the N. Y. Uniform Commercial Code)

ITEM COUNT	CASH (INCLUDE COUPONS)	DOLLARS	CENTS
1		250	—
2			
3			
4			
5			
6			
7			
8			
TOTAL		250	—

Q.P. 1214

DEPOSITOR'S COPY

19 68

FOR CREDIT TO THE ACCOUNT OF

\$4500.- note July 15 1968

reduced to \$2,575.-

shall be paid by February 25, 1969

Keen

MANUFACTURERS HANOVER TRUST COMPANY NEW YORK

(Subject to the provisions of the N. Y. Uniform Commercial Code)

Q.P. 1518

Exh. to Motion for a New Trial



CERTIFICATE OF SERVICE

The undersigned, a member of the Bar of this Court, and attorney for the Appellant Cardona on the within appeal, hereby certifies that on April 1, 1976, he served copies of the within petition for a rehearing, by mail, upon the attorneys for all of the other parties to this appeal, at their respective addresses, as follows:

David E. Trager, Esq.,
United States Attorney for the
Eastern District of New York,
225 Cadman Plaza East,
Brooklyn, New York 11201

Frank Raichle, Esq.,
Attorney for Appellants Eastern
Service Corporation, Harry
Bernstein and Rose Bernstein,
10 Lafayette Square,
Buffalo, New York 14202

Henry J. Boitel, Esq.,
Attorney for Appellant
Florence Behar,
233 Broadway,
New York, New York 10007

by depositing the same in postpaid wrappers at the Bryant Park Branch of the United States Post Office, New York City, New York.

Dated: New York, N. Y.,
April 1, 1976


John A. Kiser